

Buddy Garcia, *Chairman*  
Larry R. Soward, *Commissioner*  
Bryan W. Shaw, Ph.D., *Commissioner*



Blas J. Coy, Jr., *Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

July 14, 2009

LaDonna Castañuela, Chief Clerk  
Texas Commission on Environmental Quality  
Office of the Chief Clerk (MC-105)  
P.O. Box 13087  
Austin, Texas 78711-3087

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2009 JUL 14 PM 1:02  
CHIEF CLERKS OFFICE

Re: **RANDY EARL WYLY**  
**TCEQ DOCKET NO. 2009-0709-AGR**

Dear Ms. Castañuela:

Enclosed for filing is the Office of Public Interest Counsel's Response to Request for Hearing in the above-entitled matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Blas J. Coy, Jr.", written over a horizontal line.

Blas J. Coy, Jr.  
Public Interest Counsel

cc: Mailing List

Enclosure

**TCEQ DOCKET NO. 2009-0709-AGR**

2009 JUL 14 PM 1:02

**APPLICATION BY  
RANDY EARL WYLY/  
WYLY DAIRY NO. 1  
TO AMEND TPDES PERMIT  
NO. WQ0003160000**

§  
§  
§

**BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY**

CHIEF CLERKS OFFICE

**OFFICE OF PUBLIC INTEREST COUNSEL'S  
RESPONSE TO REQUEST FOR HEARING**

**To the Members of the Texas Commission on Environmental Quality:**

The Office of Public Interest Counsel (OPIC) files this response to the request for a contested case hearing.

**I. INTRODUCTION**

Randy Earl Wyly/Wyly Dairy No. 1 (Wyly Dairy or Applicant) has applied to the Texas Commission on Environmental Quality (TCEQ) for a major amendment of Texas Pollutant Discharge Elimination System (TPDES) permit no. WQ0003160000 for a Concentrated Animal feeding Operation (CAFO) to authorize the applicant to expand an existing Dairy facility from 1,500 head to a maximum capacity of 3,000 head, all of which would be milking cows.

The dairy is located on the west side of County Road 209, approximately 1.5 miles south of the intersection of County Road 209 and U.S. Highway 67. The intersection is approximately 7 miles southeast of Stephenville, in Erath County. The facility is located in the drainage area of the North Bosque River in Segment No. 1226 of the Brazos River Basin. The designated uses and dissolved oxygen criterion for Segment No. 1226 are contact recreation, public water supply, high aquatic life use, and 5.0 mg/L dissolved oxygen. Segment No. 1226 is currently listed on the State's inventory of impaired and threatened waters for bacteria.

The application was received by the TCEQ on October 31, 2007 and declared administratively complete on January 15, 2008. The first notice was published January 21, 2008 in the *Stephenville Empire-Tribune*. The alternative language first notice was published in the *Tex Mex Noticias* on January 28, 2008. The second notice was published September 19, 2008 in the *Stephenville Empire-Tribune*, and September 24, 2008 in *Tex Mex Noticias*. The public comment period closed October 24, 2008. Comments were timely filed by the City of Waco. The Chief Clerk of the TCEQ mailed the Decision of the Executive Director and the Executive

Director's Response to Comments (RTC) on April 13, 2009. A timely hearing request was submitted by Martin Rochelle and Lauren Kalisek, Attorneys, on behalf of the Bosque River Coalition. The Request was received by the Chief Clerk's Office on May 13, 2009.

For the reasons stated herein, OPIC recommends that the hearing request of the Bosque River Coalition be granted.

## **II. ANALYSIS**

### **A. Applicable Law**

This application was declared administratively complete after September 1, 1999, and is therefore subject to the procedural requirements adopted pursuant to House Bill 801 (76th Leg., 1999). Under 30 Texas Administrative Code (TAC) § 55.201(d), a hearing request must substantially comply with the following:

- (1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request;
- (2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;
- (3) request a contested case hearing;
- (4) list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the executive director's responses to comments that the requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy; and
- (5) provide any other information specified in the public notice of application.

Under 30 TAC § 55.203(a), an affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest. Subsection (b) states that governmental entities, including local governments and public agencies, with authority under state law over issues raised by the application may be

considered affected persons. Subsection (c) provides relevant factors to be considered in determining whether a person is affected. These factors include:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restriction or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health, safety, and use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

As provided by 30 TAC § 55.205(a), a group or association may request a contested case hearing only if the group or association meets all of the following requirements:

- (1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;
- (2) the interests the group or association seeks to protect are germane to the organization's purpose; and
- (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

Under 30 TAC § 55.211(c)(2), a hearing request made by an affected person shall be granted if the request:

- (A) raises disputed issues of fact that were raised during the comment period, that were not withdrawn by the commenter by filing a withdrawal letter with the chief clerk prior to the filing of the executive director's response to comment, and that are relevant and material to the commission's decision on the application;
- (B) is timely filed with the chief clerk;
- (C) is pursuant to a right to hearing authorized by law; and
- (D) complies with the requirements of § 55.201.

Section 55.209(e) states that a response to hearing requests must specifically address:

- (1) whether the requestor is an affected person;
- (2) which issues raised in the hearing request are disputed;
- (3) whether the dispute involves questions of fact or of law;
- (4) whether the issues were raised during the public comment period;
- (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's Response to Comment;
- (6) whether the issues are relevant and material to the decision on the application; and
- (7) a maximum expected duration for the contested case hearing.

**B. Determination of Affected Person Status**

In its hearing request the Bosque River Coalition (Coalition or Requester) states it is a Texas non-profit corporation whose purposes include the protection and enhancement of water quality in the Bosque River watershed. The request further states that its interest in protecting the water quality of the Bosque River Watershed is germane to the organization's specific purpose. The Coalition identifies Mr. Chuck Markham as a member of the Coalition who qualifies as an affected person and would otherwise have standing to request a contested case hearing in his own right.

The Coalition states that Mr. Markham owns property along an unnamed tributary of Duffau Creek, approximately 2.27 miles downstream from the Wyly Dairy. The Coalition further notes that Mr. Markham runs livestock on his property which are watered from the tributary. The Coalition also states Mr. Markham and his family use the tributary for picnic and recreational purposes. The requester asserts that discharges and runoff from the Dairy drain into the above referenced tributary and advises that Mr. Markham is concerned that the proposed discharge as authorized by the Draft Permit and its resulting impact to water quality in the tributary will threaten his and his family's use and enjoyment of his property. The Coalition concludes that Mr. Markham qualifies as an affected person with a personable justiciable interest in this application not common to members of the general public. We agree.

Under 30 TAC § 55.205(a), a group or association seeking affected person status must show that one or more members of the group or association would otherwise have standing to request a hearing in their own right. The Coalition has identified at least one member of the group who would individually qualify as an affected person. Moreover, the Coalition's interest in protecting the water quality in the Bosque River Watershed is germane to the purpose of the organization. We also agree that neither the claim asserted nor the relief requested requires the participation of Mr. Markham in the case.

As stated in its hearing request, the Coalition possesses an interest in this matter not common to the general public. We note that Mr. Markham's property is approximately 2.27 miles from the dairy, however, the law imposes no distance restriction on the requester's affected interests. We find that Mr. Markham and the Coalition have raised issues protected by the law under which the application will be considered. Mr. Markham and the Coalition have demonstrated the existence of a reasonable relationship between its interests and the regulated activity. OPIC therefore finds the Coalition has demonstrated that it qualifies as an affected person.

### **C. Issues Raised in the Hearing Request**

The Coalition disputes the following issues:

1. Whether retention control structures ("RCS") will be adequately designed, regulated and managed (Comment Nos. 1, 2, 3, 4 and 38).<sup>1</sup>
2. Whether the settling basins and slurry ponds are properly designed, regulated, and certified to protect water quality (Comment Nos. 5, 6, 7, 8, and 9).
3. Whether the Draft Permit should require an annual determination of sludge accumulation (Comment No. 10).
4. Whether capacity certification and requirements for RCSs are properly described and established in the Draft Permit to ensure water quality is protected (Comment No. 11).
5. Whether the conditions for granting extensions to the RCS compliance schedule should be included within the Draft Permit (Comment No. 12).

---

<sup>1</sup> The comments on which the Coalition's request for hearing is based were timely filed by the City of Waco and have not been withdrawn. For ease of reference, we have retained the Coalition's citation to the supporting City of Waco comment.

6. Whether liner and embankment certifications and testing specifications are adequate to ensure protection of water quality (Comment Nos. 13 and 15).
7. Whether certification of settling basins and slurry storage basins as concrete and structurally sound should be completed prior to permit issuance to ensure protection of water quality (Comment No. 14).
8. Whether an adequate description of structural controls exists in the Draft Permit (Comment No. 16).
9. Whether the Applicant has demonstrated adequate dewatering capacity (Comment No. 17).
10. Whether monitoring, reporting, and evaluation requirements under the Draft Permit will ensure that water quality is protected (Comment Nos. 18 and 19).
11. Whether structural controls should be certified prior to permit issuance to ensure that water quality is protected (Comment No. 20).
12. Whether sampling of wastewater and manure under the Draft Permit is adequate to protect water quality (Comment No. 21).
13. Whether the Draft Permit properly manages phosphorus production (Comment No. 22).
14. Whether removal of solid manure under the Draft Permit is adequate to meet water quality requirements for the North Bosque watershed (Comment No. 23).
15. Whether land management units ("LMUs") are properly sized and identified (Comment Nos. 25 and 39).
16. Whether the Applicant's projected crop yields are reasonable (Comment No. 26).
17. Whether the NMP adequately identifies sampling locations and timing (Comment Nos. 27 and 37).
18. Whether agronomic rates are properly calculated in the NMP (Comment No. 28).
19. Whether waste and wastewater application to fields exceeding 200 ppm phosphorus by the Applicant will negatively affect water quality (Comment No. 29).
20. Whether the Draft Permit provisions regarding waste application on noncultivated fields are adequate to protect water quality (Comment No. 30).

21. Whether the Draft Permit provisions regarding regulation and monitoring of third party fields are adequate to protect water quality (Comment No. 30).
22. Whether sludge should be applied to third party fields (Comment No. 31).
23. Whether the Draft Permit should require the NMP to address the five-year permit term as opposed to just the first year (Comment No. 32).
24. Whether the historical waste application fields should be identified in the application or the Draft Permit (Comment No. 33)
25. Whether the Draft Permit provides a meaningful definition of vegetative buffers (Comment No. 34).
26. Whether the appropriate method for delineating the vegetative buffer and filter strip boundaries should be included in the Draft Permit Comment No. (35).
27. Whether provisions of the Draft Permit will allow attainment of bacterial water quality standards (Comment No. 36).
28. Whether the Draft Permit establishes adequate reporting requirements for third party fields (Comment No. 40).
29. Whether the Draft Permit provides adequate protection of water quality from drainage or discharge from third party fields (Comment No. 41).

**D. Whether the disputed issues involve questions of fact or of law**

If the Commission considers an issue to be one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable requirements. OPIC concludes that each of these issues involves a question of fact and is disputed. *See* 30 TAC §55.211(b)(3)(A) and (B).

**E. Whether the issues were raised during the public comment period**

All of the listed issues were raised during the public comment period.

**F. Whether the hearing request is based on issues raised solely in a public comment which has been withdrawn**

This hearing request is based on issues raised solely in a public comment which has not been withdrawn.



**G. Whether the issues are relevant and material to the decision on the application**

In order to refer an issue to SOAH, the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit.<sup>2</sup> Relevant and material issues are those that are governed by the substantive law under which this permit is to be issued. The TCEQ is responsible for the protection of surface water quality under Chapter 26 of the Texas Water Code.<sup>3</sup> In addition, any application for a CAFO permit must comply with Chapter 307, as well as other relevant TCEQ rules, including 30 TAC § 321, Subchapter B, which requires the Commission to ensure there will be no discharge or disposal of manure, litter or wastewater from a CAFO into or adjacent to waters in the state, except in accordance with authorization issued by the Commission. Thus, the Coalition's issues which relate to the regulation and management of these types of wastes are relevant and material.

The Coalition also raises concerns with the design, regulation and management of Retention Control Structures (RCS). 30 TAC § 321.42(c) addresses requirements for the proper operation and management of RCSs. Consequently, these issues are relevant and material to the Commission's decision on this application.

The Coalition has also raised issues regarding nutrients discharged from the site and the applicant's plans to properly manage nutrients associated with the site. TCEQ rules state there must be a site-specific nutrient management plan (NMP) for all CAFOs.<sup>4</sup> Further, nutrients are regulated under the Texas Surface Water Quality Standards<sup>5</sup> and have the potential to adversely impact Texas water quality generally. Therefore, all the Coalition's issues relating to the applicant's management and discharge of nutrients, on and off-site, are relevant and material.

The Coalition also raised issues related to the land application of wastes generated by the facility. Under the applicable rules, the applicant must, at a minimum, comply with TCEQ

---

<sup>2</sup> See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-251(1986) (in discussing the standards applicable to reviewing motions for summary judgment the Court stated "[a]s to materiality, the substantive law will identify which facts are material. ... it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs.")

<sup>3</sup> See specifically, Texas Water Code § 26.027(a) and § 26.003.

<sup>4</sup> 30 TAC § 321.36(d), and 30 TAC § 321.40(k).

<sup>5</sup> 30 TAC, Chapter 307.

regulations governing the land application of manure, litter, or wastewater.<sup>6</sup> In addition, application of these types of waste to land owned by third parties must be conducted in compliance with agency rules governing third party land application.<sup>7</sup>

Each issue in the Coalition's request for hearing raises specific questions about the draft permit itself and whether the permit is adequately protective of surface water quality in the North Bosque River and the Bosque River Watershed. Protection of surface water quality is the purpose of the draft permit and therefore each issue is relevant and material.

#### **H. Issues Recommended for Referral**

OPIC recommends that the following issues be referred to the State Office of Administrative Hearings for a contested case hearing:

1. Whether retention control structures (RCS) will be adequately designed, regulated and managed.
2. Whether the settling basins and slurry ponds are properly designed, regulated, and certified to protect water quality.
3. Whether the Draft Permit should require an annual determination of sludge accumulation.
4. Whether capacity certification and requirements for RCSs are properly described and established in the Draft Permit to ensure water quality is protected.
5. Whether the conditions for granting extensions to the RCS compliance schedule should be included within the Draft Permit.
6. Whether liner and embankment certifications and testing specifications are adequate to ensure protection of water quality.
7. Whether certification of settling basins and slurry storage basins as concrete and structurally sound should be completed prior to permit issuance to ensure protection of water quality.
8. Whether an adequate description of structural controls exists in the Draft Permit.
9. Whether the Applicant has demonstrated adequate dewatering capacity.

---

<sup>6</sup> 30 TAC § 321.40.

<sup>7</sup> 30 TAC § 321.42(j).

10. Whether monitoring, reporting, and evaluation requirements under the Draft Permit will ensure that water quality is protected.
11. Whether structural controls should be certified prior to permit issuance to ensure that water quality is protected.
12. Whether sampling of wastewater and manure under the Draft Permit is adequate to protect water quality.
13. Whether the Draft Permit properly manages phosphorus production.
14. Whether removal of solid manure under the Draft Permit is adequate to meet water quality requirements for the North Bosque watershed.
15. Whether land management units (LMUs) are properly sized and identified.
16. Whether the Applicant's projected crop yields are reasonable.
17. Whether the NMP adequately identifies sampling locations and timing.
18. Whether agronomic rates are properly calculated in the NMP.
19. Whether waste and wastewater application to fields exceeding 200 ppm phosphorus by the Applicant will negatively affect water quality.
20. Whether the Draft Permit provisions regarding waste application on noncultivated fields are adequate to protect water quality.
21. Whether the Draft Permit provisions regarding regulation and monitoring of third party fields are adequate to protect water quality.
22. Whether sludge should be applied to third party fields.
23. Whether the Draft Permit should require the NMP to address the five-year permit term as opposed to just the first year.
24. Whether the historical waste application fields should be identified in the application or the Draft Permit.
25. Whether the Draft Permit provides a meaningful definition of vegetative buffers.
26. Whether the appropriate method for delineating the vegetative buffer and filter strip boundaries should be included in the Draft Permit.
27. Whether provisions of the Draft Permit will allow attainment of bacterial water quality standards.

28. Whether the Draft Permit establishes adequate reporting requirements for third party fields.
29. Whether the Draft Permit provides adequate protection of water quality from drainage or discharge from third party fields.

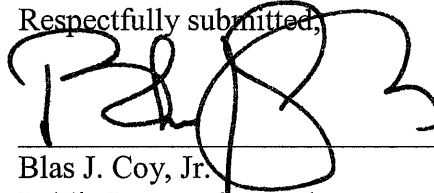
**I. Maximum expected duration for the contested case hearing**

For the contested case hearing, OPIC estimates a maximum duration of one year (12 months) from the first day of the preliminary hearing to issuance of the proposal for decision.

**III. CONCLUSION**

We conclude that the Coalition is an affected person and recommend the Commission grant its hearing request. This matter should be referred to SOAH for an evidentiary hearing on the issues set out above. OPIC further recommends a hearing duration of 12 months.

Respectfully submitted,

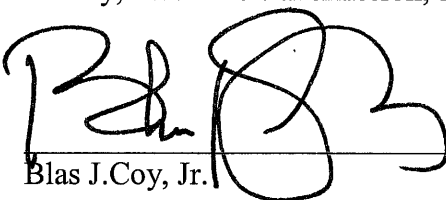


---

Blas J. Coy, Jr.  
Public Interest Counsel  
State Bar No. 04965820  
P.O. Box 13087, MC 103  
Austin, Texas 78711  
Telephone: (512) 239-6363  
Fax: (512) 239-6377

## CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2009, the original and seven true and correct copies of the foregoing document were filed with the TCEQ Chief Clerk, and copies were served to all parties listed on the attached mailing list via hand delivery, facsimile transmission, inter-agency mail, or by deposit in the U.S. Mail.

  
Blas J. Coy, Jr.

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2009 JUL 14 PM 1:03  
CHIEF CLERKS OFFICE

**MAILING LIST**  
**RANDY EARL WYLY**  
**TCEQ DOCKET NO. 2009-0709-AGR**

**FOR THE APPLICANT:**

Randy Earl Wyly  
Wyly Dairy No. 1  
3502 County Road 209  
Hico, Texas 76457-3530  
Tel: (254) 968-7101  
Fax: (254) 968-5887

Norman Mullin  
Enviro-Ag Engineering, Inc.  
3404 Airway Blvd.  
Amarillo, Texas 79118-7741  
Tel: (806) 353-6123  
Fax: (806) 353-4132

**FOR THE EXECUTIVE DIRECTOR:**

Michael Parr, Staff Attorney  
Texas Commission on Environmental Quality  
Environmental Law Division, MC-173  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-0600  
Fax: (512) 239-0606

Maria Snodgrass, Technical Staff  
Texas Commission on Environmental Quality  
Water Quality Division, MC-150  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-1298  
Fax: (512) 239-4430

**FOR OFFICE OF PUBLIC ASSISTANCE:**

Bridget Bohac, Director  
Texas Commission on Environmental Quality  
Office of Public Assistance, MC-108  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-4000  
Fax: (512) 239-4007

**FOR ALTERNATIVE DISPUTE  
RESOLUTION:**

Kyle Lucas  
Texas Commission on Environmental Quality  
Alternative Dispute Resolution, MC-222  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-4010  
Fax: (512) 239-4015

**FOR THE CHIEF CLERK:**

LaDonna Castañuela  
Texas Commission on Environmental Quality  
Office of Chief Clerk, MC-105  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-3300  
Fax: (512) 239-3311

**REQUESTER:**

Martin C. Rochelle  
Lloyd Gosselink Blevins Rochelle &  
Townsend PC  
816 Congress Ave. Ste 1900  
Austin, Texas 78701-2442